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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

STEPHANIE BOHANNA,

Plaintiff and Appellant,

v.

CLIFFORD FRANCONE,

Defendant and Respondent.

F048146

(Super. Ct. No. 03CECG04619)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Kharazi & Sirabian and H. Ty Kharazi for Plaintiff and Appellant.

Weakley, Ratliff, Arendt & McGuire and Leslie M. Dillahunty for Defendant and Respondent.

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Plaintiff Stephanie Bohanna appeals from the judgment entered after the trial court granted summary judgment in favor of defendant Clifford Francone. We will affirm.

FACTS AND PROCEDURAL HISTORY

Summary of Facts

Francone owns a single family three bedroom home in Fresno, which he purchased to rent to others. In August 2001, Francone entered into a month-to-month rental agreement with Wayne Pikul, in which Pikul agreed to rent the home for $700 per month. The agreement stated that only one person was to live in the house, and no one else could live there or sublet the home without Francone's prior written permission. The agreement further provided that violation of the agreement could be cause for eviction. Under the agreement, Pikul was responsible for paying the utilities and maintaining the residence and yards.

When Francone and Pikul entered into the rental agreement, Keith Pack, who had been living at the home as a tenant, remained a tenant and paid rent to Pikul. Sometime later, Pikul told Francone he was subletting one of the home's bedrooms to his employee, Jeff Williams.[1] Since Francone had no prior problems with Pikul and Williams was someone Pikul employed, Francone agreed to the arrangement, but never entered into a written agreement with, or received rental payments directly from, Williams. Pikul continued to pay all rent directly to Francone. Francone has never met Williams. Pikul, who knew Williams was on social security disability because he had bipolar disorder, only told Francone Williams was on disability, not that he was bipolar.

According to Pack, Williams had a violent temper and struck him one time with his fist without any provocation. Because of this incident, Pack moved out of the home in September 2002. Sometime between August 2001 and September 2002, Pack made one police report due to Williams's conduct. When Pack moved out of the house, he

[1] In his declaration, Francone stated he did not know Williams's name until he was served with the complaint in this case. Pikul, however, testified at his deposition that he told Francone Williams's name when he asked permission to sublet a room to Williams.

called Francone to ask him for a reference. Pack told Francone that he was "forced to live with a psycho 'nut'," namely Williams. According to Pack, he apprised Francone of the danger Williams was posing to the home's occupants.[2]

After Pack moved out of the home, Bohanna moved in and lived there until January 2003. Williams lived at the home with Bohanna and Pikul until October 25, 2002.

This Lawsuit

On December 23, 2003, Bohanna filed a complaint which asserted one cause of action for general negligence and alleged Williams sexually assaulted Bohanna in the home on October 10, 2002.[3] Pikul was the only named defendant. The complaint further alleged that "Williams had a history of violence against women that Defendant Piku[l] was aware of"; Pikul failed to warn Bohanna of Williams's history; Pikul, as Bohanna's landlord, had an obligation to warn her of the danger posed by Williams; and Pikul's failure to warn her was negligent and resulted in serious physical and psychological harm to her. On July 16, 2004, Bohanna amended the complaint to also name Clifford Francone as a defendant in place of Doe 1.

The Summary Judgment Motion

In December 2004, Francone filed a motion for summary judgment or, in the alternative, summary adjudication, on the following grounds: (1) Francone did not owe a duty to Bohanna because there was no special relationship between them; (2) Francone did not have a duty to warn Bohanna of Williams's alleged conduct because there was no

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[2] In contrast to Pack's statement, Francone stated he never had received any complaints about Williams from any individual.

[3] We note that while both the trial court in its tentative ruling on the summary judgment motion and Francone refer to the sexual assault as rape, the complaint does not describe what type of sexual assault occurred and there is no evidence before the court as to what conduct constituted the assault.

special relationship between Francone and Williams; and (3) Francone could not reasonably foresee the conduct which resulted in Bohanna's alleged injuries, as he did not know Williams had a history of violence against women, and therefore had no duty to prevent her injuries.

In support of the motion, Francone stated in a declaration that he never received any personal complaints about Pikul from any neighbors or any other individual and never received any personal complaints about Williams from anyone before the assault. Francone also stated he was never informed before the assault, and had no reason to believe, Williams had a history of violence against women. Neither did he have personal knowledge of Williams ever assaulting or threatening to assault another individual. Francone did not have a written agreement with Bohanna allowing her to stay at the home and never consented to her staying there.

Bohanna opposed the motion, arguing that Francone had a duty to evict Williams when Pack told him Williams was a "psycho." Although Francone had claimed he never met Bohanna, Bohanna stated in her declaration that she met Francone in November 2002, after the alleged assault, when he came to the home to pick up the rent from her when Pikul was out-of-town.

The court tentatively ruled in Francone's favor, concluding Francone owed no duty to Bohanna because Francone could not have reasonably foreseen that Williams would sexually assault Bohanna, as Bohanna had not presented any evidence to establish Francone knew or had reason to know Williams had a history of violence against women.[4] After oral argument, the court confirmed its ruling in Francone's favor, and judgment was entered in his favor. Bohanna appeals.

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[4] In so ruling the court sustained several relevancy objections Francone made to evidence Bohanna submitted in opposition to the motion, including a computer printout purportedly of a list of police calls to the residence, Bohanna's statements regarding handing a rent check to Francone in November 2002, and Pack's statements that

DISCUSSION

Standard of Review

The procedure for making and grounds for granting a motion for summary judgment are set forth in Code of Civil Procedure section 437c. The court must grant the motion if "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) A moving party has the initial burden of producing evidence to make a prima facie showing that no triable issue of material fact exists. (*Ibid.*) Where the defendant is the moving party, this means the defendant must produce evidence showing that the plaintiff cannot establish at least one element of each of its causes of action. (*Id.* at p. 854.) It does not mean that a moving defendant must "conclusively negate" an element of plaintiff's causes of action. (*Id.* at pp. 853-854.) The burden of production then shifts to the nonmoving party who must produce evidence to make a prima facie showing that a triable issue of material fact exists. (*Id.* at p. 850.) Unlike the burden of production, the burden of persuasion never shifts but remains on the moving party. (*Ibid.*)

Francone falsely told him he sold the home to Pikul. Bohanna does not challenge these rulings on appeal. Accordingly, we do not consider this evidence. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 [on review of summary judgment, appellate court does not consider evidence to which objections have been made and sustained].) Despite this rule of appellate review, Bohanna relies on much of the excluded evidence in her statement of facts and throughout her opening brief. For example, Bohanna states that Williams beat her on October 16, 2002, citing to the excluded police report. The only basis for negligence cited in the complaint, however, is the sexual assault incident on October 10, 2002. As the trial court found, whatever occurred after October 10, 2002 is therefore irrelevant to this motion and we do not consider any such evidence on appeal.

On appeal from a summary judgment, "we determine de novo whether an issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. [Citation.] In other words, we must assume the role of the trial court and reassess the merits of the motion. [Citation.] In doing so, we will consider only the facts properly before the trial court at the time it ruled on the motion. [Citation.]" (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601; see also *Chaknova v. Wilbur-Ellis Co.* (1999) 69 Cal.App.4th 962, 967.) In this role, we do not decide the merits of the issues, but limit our review to "determining if 'there is evidence requiring the fact-weighing procedures of a trial. [Citation.]'" (*Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 717 (*Pensinger*), disapproved on other grounds in *Colmenares v. Braemar County Club, Inc.* (2003) 29 Cal.4th 1029, 1031, fn. 6.) We review directly those papers submitted in connection with the motion. (*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213, 1218.)

Our assessment of a motion for summary judgment involves the same three-step analysis applicable in the trial court. "'We first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond.'" (*Pensinger*, *supra*, 60 Cal.App.4th at pp. 717- 718.) Second, we determine whether the moving party has met his or her burden of proof "by reliance on competent declarations, binding judicial admissions contained in the allegations of the [opposing party's pleadings], responses to discovery, and the testimony of witnesses at noticed depositions. ([Code Civ. Proc.,] § 437c, subd. (b); *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20-21; [citations].)" (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162.) Third, we "'" determine whether the opposition demonstrates the existence of a triable, material factual issue."'" (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1513.)

We are not obliged to cull the record for appellant's benefit in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the

appellant's responsibility to discharge his or her duty to affirmatively demonstrate error and therefore to point out to this court the triable issues the appellant claims are present. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

Because of the severity of the consequences of summary judgment, we carefully scrutinize the moving party's papers and resolve all doubts regarding the existence of material, triable issues of fact in favor of the party opposing the motion. (*Pensinger, supra,* 60 Cal.App.4th at p. 717.) "'"[T]he moving party's affidavits are strictly construed while those of the opposing party are liberally construed." ... We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence.... In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true.' [Citation.]" (*Cheyanna M. v. A.C. Nielsen Co.* (1998) 66 Cal.App.4th 855, 861.) Like the trial court, we must consider all the evidence properly identified in the papers submitted, "except that to which objections have been made and sustained by the court." (Code Civ. Proc., § 437c, subd. (c); *Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 561, fn. 2.)

With these principles in mind, we evaluate whether summary judgment was proper.

The Legal Issue of Duty

The complaint here alleges a single cause of action for negligence. An action in negligence traditionally requires a showing that the defendant owed the plaintiff a legal duty, the defendant breached the duty, and the breach was a proximate or legal cause of injuries suffered by the plaintiff. (See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673 (*Ann M.*).) Generally, the question whether or not a duty exists is to be resolved by the court rather than a jury. (*Id.* at p. 674.) In any given case, the imposition of a duty is "'an expression of the sum total of those considerations of policy which lead the law to say that [a] particular plaintiff is entitled to protection.' [Citation.]"

(*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) The courts, through the common law, have determined that an actor has no legal duty to avoid harm that is not foreseeable. (See *Ann M., supra,* 6 Cal.4th at p. 678.)

The complaint does not make any specific allegations regarding the duty Francone is charged with in this case; the only specific allegations made are against Pikul, which assert that he was aware Williams had a history of violence against women, yet failed to warn Bohanna of that history. Francone's summary judgment motion assumed the same allegations were made against Francone, i.e. that Francone knew Williams had a history of violence against women that he failed to warn Bohanna about. The basis for Francone's motion was that he was not aware of any such history and had never received complaints about Williams. Bohanna essentially argued in her opposition to the motion that Francone was put on notice that Williams had dangerous tendencies when Pack told him Williams was a "psycho nut" and a danger to others in the home. No evidence was presented that Williams in fact had a history of violence against women, or even against men. At best, there was evidence from Pack's declaration that Williams had a violent temper and struck him once with his fist without any provocation. There is no evidence, however, that Francone was aware of this incident. The trial court rejected Bohanna's argument, finding there was no evidence Francone knew Williams had a history of violence against women.

On appeal, Bohanna contends Francone knew of William's violent tendencies, and therefore had a duty to warn Bohanna or remove Williams. Francone responds that summary judgment was proper because Francone was not aware Williams had a history of violence against women. While Bohanna argues on appeal that a landlord's knowledge that a male tenant has been violent, e.g. the male tenant has engaged in a physical altercation with another man, is sufficient to put a landlord on notice that the tenant may sexually assault a female tenant, we need not address this issue because even

if that is true, no evidence was produced here showing that Francone knew Williams had a history of violence against anyone.

The key issue in determining whether Francone owed a duty to protect Bohanna from the sexual assault by Williams is the foreseeability of the harm. Foreseeability in landlord/tenant cases involving third party criminal conduct, however, cannot be determined in a vacuum – the amount of foreseeability required in a particular case depends on the measures the tenant claims the landlord should have undertaken to prevent the harm. Our Supreme Court recently set forth the following guiding principles in this area: "In circumstances in which the burden of preventing future harm caused by third party criminal conduct is great or onerous (as when a plaintiff, such as in *Ann M.*, asserts the defendant had a legal duty to provide guards or undertake equally onerous measures, or as when a plaintiff, such as in *Sharon P. [v. Arman, Ltd.* (1999) 21 Cal.4th 1181] or *Wiener* [*v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1146-1148], asserts the defendant had a legal duty to provide bright lighting, activate and monitor security cameras, provide periodic 'walk-throughs' by existing personnel, or provide stronger fencing), heightened foreseeability – shown by prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location – will be required. By contrast, in cases in which harm can be prevented by simple means or by imposing merely minimal burdens, only 'regular' reasonable foreseeability as opposed to heightened foreseeability is required." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 243 fn. 24.)

Here, Bohanna contends Francone should have protected her by either warning her that Williams had a violent temper or removing Williams from the home. Both of these actions assume Francone had actual or constructive knowledge that Williams had a violent temper or that Francone knew facts which would provide some ground for removing Williams. The evidence, however, establishes only that Pack told Williams when he was moving out of the home that Williams was a "psycho nut" and posed an

unspecified danger to the home's occupants.[5] The issue, then, is whether this evidence put Francone on notice that Williams was violent so that he should have either warned Bohanna or removed Williams.

Two cases, which both parties rely on, are instructive in this area, each of which involved one tenant's criminal conduct against another tenant. In *Madhani v. Cooper* (2003) 106 Cal.App.4th 412 (*Madhani*), the plaintiff had complained to her apartment building's managers on at least six occasions that another tenant named Moore, who lived in the apartment across from hers, had yelled at, pushed, bumped into or blocked the way of either her or her mother. (*Madhani*, *supra*, 106 Cal.App.4th at pp. 413-414.) One night, Moore yelled at the plaintiff, grabbed her by the hair and threw her down the stairs. The plaintiff sued the landlords for negligence in failing to protect her from the assault. (*Id.* at p. 415.)

The Court of Appeal reversed the trial court's grant of summary judgment in the landlords' favor, stating: "It is difficult to imagine a case in which the foreseeability of harm could be more clear. We are not dealing here with an isolated incident or extraordinary behavior on the part of Moore. Through their agents, the building managers, the landlords knew or should have known Moore had engaged in repeated acts of assault and battery against [the plaintiff] as well as her mother." (*Id.* at p. 415, fn. omitted.) The court concluded it was foreseeable Moore's violent outbursts and physical assault would eventually result in serious injury to the plaintiff so as to require the landlords to take reasonable steps to protect her from Moore, who had a known proclivity for making verbal and physical assaults on the plaintiff. (*Id.* at p. 416.)

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[5] Although Bohanna states Pack told Francone Williams had a violent temper and struck him, Pack's declaration does not support this assertion, as it states only that he told Francone "I was … forced to live with a psycho 'nut,' that being Jeff Williams[,]" and "I did apprise him [Francone] of the danger Mr. Williams was posing to the occupants of the home."

In the other case, *Davis v. Gomez* (1989) 207 Cal.App.3d 1401 (*Davis*), parents filed a wrongful death action against their deceased son's landlord after another tenant who lived in the same apartment building as their son shot and killed him as he walked past her apartment door. The trial court granted summary judgment in the landlord's favor after determining the landlord had no duty to take measures to monitor or control the tenant's psychotic behavior, where it was apparent the tenant was "'losing her mind'" and other tenants complained to the apartment manager that they felt threatened by the tenant's actions, were worried about the safety of the other tenants, had seen a gun in her living room, and had seen the tenant standing in her apartment window, talking to herself out loud and moving her hands as if casting spells on those who walked by. (*Id.* at pp. 1402-1403.) The Court of Appeal affirmed, concluding the landlord did not owe a duty to the son as a matter of law, since the parents failed to establish what action the landlord could have taken, even with a reasonable investigation, with respect to the tenant's deteriorating mental condition, and the tenant had shown no dangerous tendencies, other than possessing the handgun. (*Id.* at p. 1406.)

Here, the only evidence presented of Francone's prior knowledge of Williams's conduct is Pack's statement to him that Williams was a "psycho nut" and a danger to other tenants. While Bohanna claims it can be inferred from the evidence Pack in fact warned Francone that Williams had a violent temper, we disagree, as Pack's declaration does not state that he told Francone Williams had a violent temper or that Williams struck him without provocation. Bohanna simply did not present any evidence which showed that Francone was told Williams had engaged in violent behavior. Without that knowledge, certainly Francone could not warn Bohanna.[6] Although Francone may have

[6] Moreover, there is no evidence that Francone knew Bohanna was living in the home before she was allegedly assaulted, which provides another reason not to impose on him a duty to warn her.

had some basis to evict Pikul or remove Williams, as he did not consent in writing to Williams living there, the mere fact that Pack told Francone Williams was "psycho" and a danger to other tenants does not create a duty for him to take those actions. In this sense, this case is more like *Davis* than *Madhani*, since no one told Francone that Williams had engaged in violent behavior, and being a "psycho" does not necessarily mean that a person will engage in such behavior.

Simply put, there was an insufficient showing here to put Francone on notice of Williams's propensity for violence. (See *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 595-596 [landlord of mobile home park had no duty to protect tenant from battery by another tenant where prior complaints about tenant involved harassment, verbal insults and annoyance, not assault or battery].)[7] Accordingly, the trial court properly granted summary judgment in Francone's favor.

[7] The other case Bohanna relies on, *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, does not compel a different result. In *Vasquez*, the court concluded the owners of an apartment building had a duty to their tenant, who was murdered by her boyfriend, to replace a missing pane of glass in the apartment's front door the murderer used to obtain entry. (*Id.* at pp. 274, 285-287.) The court concluded that although the owners did not know of the murderer's violent propensities, the owners should have known of the slight likelihood an intruder might seek to enter the apartment, and therefore they had a duty to take the minimally burdensome steps available to restore the front door's integrity. (*Id.* at pp. 286-287.) In contrast here, it was not highly foreseeable that Williams would attack Bohanna, therefore Francone did not have a duty to remove him or warn Bohanna.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

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Gomes, J.

WE CONCUR:

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Harris, Acting P.J.

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Cornell, J.